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No. 410

IN THE
Supreme Court of the United States

October Term 1952

ADAM THOMAS, *Appellant*

VS.

HEMPT BROTHERS, A Partnership, *Appellee*.

BRIEF FOR APPELLANT

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ADAM THOMAS, *Appellant*

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BRIEF FOR APPELLANT

STATEMENT OF THE QUESTION INVOLVED

1.

Whether an employee regularly engaged on the company's premises in preparing concrete mixes and materials for use in the repair, reconstruction, extension and maintenance of inter-state highways, roads, railroads, airports and government installations, dispatching the company's trucks loaded with the said mixes and materials to the site of the various inter-state projects, and

keeping records for company use of the mixture and materials compounded and dispatched by company trucks to the site where the physical work of applying said mixes and materials was being carried on by other employees of the same company, is engaged "in commerce" or "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended?

2.

Did the Court below err in concluding as a matter of law that "off-the-road" employees thusly engaged are not covered by the said Act?

STATEMENT OF THE CASE

The plaintiff-appellant, an employee of defendant-appellee filed his complaint in assumpsit in the Court of Common Pleas of Cumberland County, Pennsylvania, seeking to recover over-time wages, admittedly not paid him, for a specified time, liquidated damages and counsel fees under the provisions of Sec. 6, 7, 16(b) of the Fair Labor Standards Act of 1938, as amended.

Preliminary objections to the amended complaint, in the nature of a demurrer, were sustained by the Court of Common Pleas. On appeal to the Supreme Court of Pennsylvania, the judgment was affirmed.

The issue is whether an employee doing the type of work engaged in by appellant falls within the coverage of the Act or is excluded by reason of not being "in commerce" or "engaged in the production of goods for commerce".

The Defendant-Appellee Company is a partnership with its principal place of business in Camp Hill, Pennsylvania. It is engaged in the business of quarrying stone,

compounding stone mixtures and hauling its products to construction jobs being worked upon by defendant's employees where the various compounds are physically applied to the roadway, railroad bed, airport or other interstate projects. Plaintiff-appellant does his work on the company's premises, being engaged in compounding the materials which go into the roads or other projects engaged upon by his employer, and overseeing and directing the loading of the company trucks with the correct formulas for each specific project, after which he dispatches the loaded trucks to the site of the various projects. He reports to the office the nature, kind and quantity of materials compounded, and the number of trucks dispatched to the jobs. He does not physically apply the materials "on the road", and for this reason he was held to be an "off the road" employee, not covered by the Act.

ARGUMENT

I.

So-called "Off the Road" Employees Engaged in the Repair, Reconstruction, Extension or Maintenance of Interstate Highways, Roads, Railroads, Airports and Government Installations Are Engaged "In Commerce" or "In the Production of Goods for Commerce" Within the Meaning of the Fair Labor Standards Act of 1938, as Amended.

Appellee throughout the history of the instant case has taken the position that the "on the road—off the road" test supplies the legal answer to the question presented. It is submitted that there is no such absolute touchstone. *Kirschbaum Co. v. Walling*, 316 U.S. 517, 520 affirming 124 F (2) 567. There is no exemption from coverage in the pertinent Act of Congress for employees who work

"off the road". The genuine test is that set forth by this Court in *Walling v. Jacksonville Paper Co.* 317 U.S. 564, and *Overstreet v. North Shore Corp.* 318 U.S. 125, as follows: "It is clear that the purpose of the Act was to extend Federal control in this field throughout the farthest reaches of the channels of inter-state commerce'. And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations."

The "practical considerations" referred to by this Court were that the employees' work is "vital to the proper functioning of these structures as instrumentalities of inter-state commerce" (*Overstreet* 318 U.S. at 130) and "because without their services these instrumentalities would not be open to the passage of goods and persons across state lines" (*Ibid.*).

The preparation and hauling of materials and road mixes necessary for specific road repairs are, it is submitted, as "indispensable" and "vital" to the proper functioning of the channels of inter-state commerce as is the physical application of that mixture to the roadway. Under the ruling of the Supreme Court of Pennsylvania, however, only those employees actually engaged in the physical "on the road" application of the materials are "in commerce" and entitled to the benefits of the Act. The Court of first instance (Ct. of Common Pleas, Cumberland Co., Pa.) ruled as a matter of law that "off the road" employees such as appellant, engaged in making, over-seeing the hauling and keeping records of types of materials dispatched to various inter-state construction jobs, were not covered by the Act. The ruling of the Courts below overlooked, it is submitted, that Appellant's duties at the employer's plant was a "component part of and integrated unit" and "indispensable" to the proper carrying on of the inter-state projects.

The distinction made by the Court of first instance and affirmed by the Supreme Court of Pennsylvania is a fine, narrow one which is unrealistic and impractical. Numerous Federal decisions have recognized that an employee's activities need not be physically on the instrumentality of inter-state commerce in order for his work to be part of inter-state commerce within the meaning of the Act.

Walling v. Jacksonville Paper Co. 317 U.S. 564, (167 F(2) 286).

Walling v. McCrody Construction Co. 156 F(2) 932, certiorari denied, 329 U.S. 785.

Ritch v. Puget Sound Bridge & Dredging Co. 156 F(2) 334 (C.A. 9).

Appellant's work brought him into an immediacy of participation with the physical work being carried on "off the premises". *Walling v. Craig*, 53 F. Supp. 479; *Roland Electrical Co. v. Walling*, 326 U.S. 657.

To eliminate appellant from coverage is to accept a fine legalistic distinction and unrealistic approach such as was condemned by this Court in *Walling v. Jacksonville Paper Co.* 317 U.S. 564 (167 F (2) 286 at 288).

In *Laudadio v. White Construction Co.* 163 F(2) 383, the draftsman who prepared preliminary paper work preparatory to the commencement of actual work at the construction site were held to be covered by the Act. If such employees had sufficient "immediacy of participation" to the inter-state project as to be covered by the Act, it seems to follow *a fortiori* that those who prepare the very materials which go into the channel of commerce and become a part of said instrumentality have an "immediacy of participation" in the "integrated" project so as to be a part of commerce.

What was said by the learned Court in *Tobin v. Alstate Construction Co.* 195 F (2) 577 (C.A. 3) is equally applicable to the instant case, for the same type of work under review in that case is the subject of the instant case: "We are of the opinion that Alstate's off the road employees, in producing material which is used to repair and maintain the surfaces of instrumentalities of commerce are engaged in the production of goods for commerce'".

II.

The Pennsylvania Supreme Court Refused to Follow the Ruling of the Highest Federal Judicial Authority to Pronounce Upon the Applicable Federal Statute.

The Pennsylvania Supreme Court expressly refused to follow the decision of the Federal Circuit Court (3rd C.A.) in deciding the instant case. See *Thomas v. Hempt Bros.* 371 Pa. 383. Instead it purported to follow a 1946 decision of the Tenth Circuit (*Schroeder v. Clifton*, 153 F(2) 385, certiorari denied 328 U.S. 858) which the Third Circuit found was not controlling under the facts before it. The Court of first instance (Ct. of Common Pleas, Cumberland Co., Pa.) ruled as a matter of law that the *Schroeder* case excluded "off the road" employees from coverage under the Act, sustaining a demurrer to the Complaint, and thus ruling without hearing any testimony at all in the case. (R p. 15)

An examination of the facts in the instant case and the Alstate case show at once that the *Schroeder* case cannot be controlling. In the *Schroeder* case there was a *finding of fact*, after evidence offered, that the stone pickers within quarry excavations were engaged in local commerce. Moreover, the *Schroeder* case does not actually rest upon a determination of the status of the quarry workers but rather upon a distinction between original

construction and repair. In the light also of the later decisions in *Walling v. McCrody* (C.A. 3) and *Bennett v. V-P Loftis Co.* 167 F(2) 286 (C.A. 4) it is submitted that the general classifications set up by the *Schroeder* case are at least of doubtful authority and are directly in conflict with the rulings of the cited cases.

III.

The Pennsylvania Supreme Court Erred in Affirming the Judgment of the Trial Court, Which Judgment Was Entered on the Pleadings.

The Trial Court sustained defendant's (appellee's) demurrer to plaintiff's (appellant's) amended Complaint (R. pg. 13) holding as a matter of law that no cause of action existed within the provisions of the Fair Labor Standards Act. On appeal the Supreme Court of Pennsylvania affirmed. (R. pg. 18)

If plaintiff (appellant) is covered by the Act, as it is contended that he is, on the authority of the Federal decisions cited in paragraphs I and II of this brief, then the action of the Trial Court in sustaining the demurrer to the pleadings and the action of the Supreme Court of Pennsylvania in affirming the lower Court was erroneous, and should be reversed by this Court.

Paragraph IV of the Amended Complaint (R. pg. 3) sets forth the allegations which the Court of first instance ruled did not state a cause of action under the Fair Labor Standards Act. (R. pg. 13, 14, 15, 16) The conclusion of the learned Trial Court is expressed in the following language: (R. pg. 14)

"In support of his demurrer the defendant contends that the plaintiff's Complaint affirmatively discloses that the plaintiff was an off-the-road employee, at a quarry, and therefore was beyond the scope of the Fair Labor Standards Act of 1938, and that the

defendant is therefore entitled to a judgment on the pleadings. A consideration of the decisions interpreting the Act leads to the conclusion that this position is well taken."

This ruling, affirmed on appeal by the Supreme Court of Pennsylvania, directly conflicts with the ruling of the Circuit Court (3rd) in *Tobin v. Alstate, supra*, so that there presently exists within Pennsylvania one rule for litigants in the Federal Courts and another for litigants in the State Courts.

For the reasons set forth in this brief, it is submitted, the decisions of the State Courts are erroneous and should be set aside by this Court.

IV.

Plaintiff Did Not Re-amend His Complaint Since He Could Not Aver Any Different Factual Situation From the One Set Forth in the Pleadings.

The Trial Court accorded Plaintiff an opportunity to amend its Amended Complaint within 20 days if he cared to do so prior to entry of judgment against him. Plaintiff did not elect so to do but instead appealed to the Supreme Court of Pennsylvania after judgment was entered in the Court below. Appellee has contended that Plaintiff (appellant) ought to have availed himself of the opportunity to re-amend. To have done so, however, would have only served to prolong the litigation and involve additional and futile argument on the pleadings, for Plaintiff had set forth his allegations as factually as possible. He could not state any different facts unless he resorted to an unrealistic factual situation. Hence he chose not to re-amend his Complaint, but instead to have the issue passed upon by the appropriate appellate tribunal.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed and set aside and the lower court directed to enter judgment in favor of appellant.

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